

TO: Mail Stop 8  
 Director of the U.S. Patent & Trademark Office  
 P.O. Box 1450  
 Alexandria, VA 22313-1450

**REPORT ON THE  
 FILING OR DETERMINATION OF AN  
 ACTION REGARDING A PATENT OR  
 TRADEMARK**

In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been  
 filed in the U.S. District Court Northern District of California on the following ☐ Patents or ☒ Trademarks:

DOCKET NO. CV 11-00781 HRL	DATE FILED 2/2/2011	U.S. DISTRICT COURT 280 South First Street, Rm 2112, San Jose, CA 95113
PLAINTIFF NATURAL WELLNESS CENTERS OF AMERICA		DEFENDANT ESSENTIAL FORMULAS INCORPORATED
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 2,767,607		SEE ATTACHED COMPLAINT
2		
3		
4		
5		

In the above—entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading		
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK	
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
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CLERK Richard W. Wieking	(BY) DEPUTY CLERK Betty Walton	DATE February 25, 2011
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Copy 1—Upon initiation of action, mail this copy to Commissioner Copy 3—Upon termination of action, mail this copy to Commissioner  
 Copy 2—Upon filing document adding patent(s), mail this copy to Commissioner Copy 4—Case file copy

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Attorney for Plaintiff  
NATURAL WELLNESS CENTERS OF AMERICA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NATURAL WELLNESS CENTERS OF  
AMERICA, a California corporation

Plaintiff,

vs.

ESSENTIAL FORMULAS  
INCORPORATED, a Texas corporation,  
CHUCK WAGNER, a Tennessee resident,  
CHOOSE TO BE HEALTHY, an  
unincorporated entity dba  
CHOOSE TO BE HEALTHY.COM, and DOES  
1-10

Defendants.

Case No:

COMPLAINT FOR INJUNCTIVE RELIEF  
AND DAMAGES FOR:

1. Federal Trademark Infringement;
2. Federal Unfair Competition;
3. Unfair Competition under Cal. Prof.  
Code § 17200 *et seq.*;
4. Dilution of Trademarks

Demand for Jury Trial

Plaintiff NATURAL WELLNESS CENTERS OF AMERICA, a California corporation  
(hereafter "Plaintiff" and/or "NWC") for their complaint against ESSENTIAL FORMULAS  
INCORPORATED, a Texas corporation, CHUCK WAGNER, a Tennessee state resident,  
CHOOSE TO BE HEALTHY, an unincorporated entity dba CHOOSE TO BE HEALTHY.COM,  
and DOES 1-10 (hereafter collectively "Defendants"), alleges as follows:

**Nature of this Action**

1. This is an action to redress violations of the federal trademark laws, 15 U.S.C.  
§ 1114, *et seq.*, federal laws of unfair competition, 15 U.S.C. § 1125(a) *et seq.*, as amended, 15  
U.S.C. § 1065 *et seq.*, California state law of unfair competition, Cal. Bus. & Prof. Code § 17200  
*et seq.*, and dilution of trademarks, 15 U.S.C. § 1125(a), as a result of willful and unauthorized

1 use by Defendants of Plaintiff NWC's registered trademark(s), including but not limited to PRO-  
2 BIOTIC PLUS, as more fully set forth hereinafter. NWC seeks injunctive relief restraining  
3 infringement by Defendants of NWC's names and trademark, damages as the direct and  
4 proximate result thereof, and related relief. Unless Defendants' use of the trademark is stopped,  
5 the damage to Plaintiff NWC will be irreparable.

6 Plaintiff, for their claims against Defendants, further alleges the following:

7 **Jurisdiction and Venue**

8 2. This Court has subject matter jurisdiction over this Claim pursuant to 15 U.S.C. §  
9 1121 and 28 U.S.C. §§ 1331, 1338, 1367, 1498, 15 U.S.C. § 1125(a) because this is an action  
10 which involves claims arising under the U.S. trademark laws, as well as related federal claims for  
11 unfair competition.

12 3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c) and 1400 in  
13 that Defendants, and each of them, is subject to personal jurisdiction in this district and this is  
14 the district in which acts of trademark infringement and unfair competition were committed.  
15 Venue is also proper because Defendants' services and related products are available in  
16 California and over the internet and into California regularly and on a systematic basis.

17 **Intradistrict Assignment**

18 4. Assignment on a district-wide basis is appropriate under Civil Local Rule 3-2(c)  
19 because this is an Intellectual Property Action.

20 **The Parties**

21 5. Plaintiff NATURAL WELLNESS CENTER OF AMERICA is a California  
22 corporation, having a business address at 27071 Cabot Road, Suite 121, Laguna Hills, California.  
23 Since and around 1995, NWC has been engaged in the business of manufacturing, distributing,  
24 marketing and selling a range of nutritional supplements. Since around 2002, NWC has been  
25 distributing, marketing and selling a range of probiotics based PRO-BIOTICS PLUS nutritional  
26 supplements through its website naturalwellness.com, probioticsplus12.com, and/or other retail  
27 and wholesale channels.

28 6. Upon information and belief, Defendant ESSENTIAL FORMULAS

1 INCORPORATED (hereafter "EFI") is a Texas corporation, having a business address at 1861  
2 Valley View Lane, Suite 180, Farmers Branch, Texas. EFI allegedly owns and operates website  
3 [www.ProbioticPlus.net](http://www.ProbioticPlus.net) and markets, distributes, sells a range of "Dr, Ohirra's Probiotic Plus"  
4 and "Dr, Ohirra's Probiotics 12 Plus" branded nutritional supplements over its website(s) and  
5 other channels.

6 7. Upon information and belief, Defendant CHUCK WAGNER (hereafter  
7 "WAGNER") is a Tennessee resident. Defendant CHOOSE TO BE HEALTHY is a business  
8 entity of unknown form dba CHOOSETOBEHEALTHY.com, owned and operated by Defendant  
9 WAGNER, having a business address at P.O. Box 125, 195 Delta Drive, Conasauga, Tennessee.  
10 WAGNER and CHOOSE TO BE HEALTHY allegedly own and operate website  
11 [www.ChooseToBeHealthy.com](http://www.ChooseToBeHealthy.com) and markets, distributes, sells a range of "Dr, Ohirra's Probiotic  
12 Plus" and "Dr, Ohirra's Probiotics 12 Plus" branded nutritional supplements over its website(s)  
13 and other channels.

14 **Allegations Common To All Counts**

15 8. Since 1995, NWC has been manufacturing, distributing, marketing and selling all  
16 natural probiotics, digestive enzymes, systemic enzymes and whole food nutritional supplements.  
17 In 2002, NWC launched its PRO-BIOTICS PLUS dietary supplement, as shown in Exhibit 1,  
18 and has been distributing, marketing and selling PRO-BIOTICS PLUS branded dietary  
19 supplement through its own website [naturalwellness.com](http://naturalwellness.com), and/or other retail and wholesale  
20 channels. Over the years, NWC has made extensive efforts to establish and promote the PRO-  
21 BIOTICS PLUS brand line of products which contribute greatly to its current status as one of  
22 NWC's top selling product lines. In addition, NWC markets its products through its website  
23 [www.probioticsplus12.com](http://www.probioticsplus12.com). ProBiotics Plus is a product which contains 12 probiotic strains, and  
24 is a highly active formula with years of technology behind it. ProBiotics Plus 12 chewables  
25 contain 12 strains of friendly bacteria (Probiotics), FOS (prebiotic nutrient), and Chelated Zinc,  
26 with 5.5 Billion CFUs per tablet.

27 9. NWC has never authorized use of its PRO-BIOTICS PLUS registered trademark  
28 by any one of the Defendants.

Registered Trademark

10. NWC is the sole owner of incontestable U.S. Trademark Registration No. 2,767,607 registered September 23, 2003 for the mark "PRO-BIOTICS PLUS", Exhibit 2.

11. Since as early as August 6, 2002, Plaintiff has used the PRO-BIOTICS PLUS trademark in the United States in connection with the products listed in the foregoing registration, including nutritional supplements.

12. NWC's PRO-BIOTICS PLUS trademark is inherently distinctive and has acquired distinctiveness through continuous and widespread use of the mark in the U.S. and worldwide.

Defendants' Infringing Activities

13. In around April of 2010, NWC became aware that Defendant EFI was displaying and offering for sale various "Dr. Ohirra's Probiotic Plus" and "Probiotics 12 Plus" branded products through their ProbioticPlus.net website(s), including but not limited to www.probioticplus.net, (hereafter the "EFI website"), as well as through some third-party sites such as Amazon.com. Copies of representative screen-shots from the EFI website and search engine websites comprise Exhibit 3. Defendant EFI was not and is not an authorized manufacturer, distributor, licensee or importer of NWC merchandise.

14. On or about April 27, 2010, NWC sent Defendant EFI a demand letter via electronic mail informing them of trademark infringement of NWC's registered trademark and demanding that EFI immediately cease and desist all use, including display, promotion and sale of their various unauthorized and/or counterfeit items.

15. On or about May 4, 2010, EFI received a response from Defendant EFI via its legal representative acknowledging receipt of NWC's April 27, 2010 notice of infringement and denying any wrong doing.

16. At about the same time, NWC became aware that Defendant CHUCK WAGNER through his entity CHOOSE TO BE HEALTHY and through his website(s), including and net limited to www.choosetobehealthy.com, (hereafter collectively CHOOSE TO BE HEALTHY); displaying and offering for sale various "Probiotic Plus" and "Dr. Ohirra's Probiotics 12 Plus" branded products. Copies of representative screen-shots from the

1 CHOOSE TO BE HEALTHY.COM website and other search engine websites comprise Exhibit 4.  
2 Defendant CHOOSE TO BE HEALTHY was not and is not an authorized manufacturer,  
3 distributor, licensee or importer of NWC merchandise.

4 17. Despite knowledge of NWC's registered Trademark, Defendants continue to  
5 display and offer for sale various unauthorized "Probiotic Plus" and "Probiotics 12 Plus" branded  
6 products through their usual channels of product distribution.

7 18. Defendants continue to and likely to expand their unauthorized use of NWC's  
8 PRO-BIOTICS PLUS registered trademark on their own websites and third-party websites, and,  
9 unless restrained by this Court, will continue to unfairly compete with NWC by displaying,  
10 marketing and selling infringing products.

11 **FIRST CAUSE OF ACTION**

12 **(Federal Trademark Infringement)**

13 **Under 15 U.S.C. § 1065 et seq.**

14 19. Plaintiff repeats each and every allegation set forth in paragraphs 1 through 18  
15 above.

16 20. The incontestable U.S. registered trademark PRO-BIOTICS PLUS (the  
17 "Registered Trademark") as described above has been extensively used, advertised, and promoted  
18 throughout the United States and the world in connection with NWC's products as identified  
19 above.

20 21. The Registered Trademark is inherently distinctive. Moreover, it is conclusively  
21 distinctive because the registration is incontestable. As a result of NWC's use, advertisement and  
22 promotion of NWC's Registered Trademarks, the Registered Mark has become well and  
23 favorably known throughout the United States and the world as identifying NWC and its  
24 probiotics-based nutritional supplement products. NWC has developed exceedingly valuable  
25 goodwill with respect to its Registered Trademark.

26 22. Upon information and belief, Defendants, each of them, have knowingly,  
27 willfully and intentionally created, imported, advertised, promoted, displayed, offered for sale  
28 and/or sold infringing products bearing identical, nearly identical and/or confusingly similar

1 copies of NWC's Registered Trademark, as identified above and depicted in Exhibit 3 and 4  
2 hereto.

3 23. Defendants' use of each of the Registered Trademark on their products is likely  
4 to cause members of the relevant public and trade to believe that Defendants' products are  
5 provided by or in affiliation with or under the license, sponsorship or approval of NWC when  
6 used in connection with the identical, substantially similar, or related goods.

7 24. Upon information and belief, Defendants willfully and intentionally selected,  
8 adopted and/or used the Registered Trademark on their goods with knowledge of the valuable  
9 goodwill and business reputation associated therewith, and with intent to confuse, mislead, and  
10 deceive the relevant consuming public into believing that Defendants' goods originate with NWC  
11 or are in some manner associated with, approved or endorsed by NWC.

12 25. Unless restrained by this Court, Defendants will continue to infringe NWC's  
13 Registered Trademark by using the Registered Trademark on Defendants' goods.

14 26. By their wrongful acts, Defendants, unless restrained by this Court, will cause  
15 serious and irreparable harm to NWC.

16 27. NWC has no adequate remedy at law.

17 **SECOND CAUSE OF ACTION**

18 **(Federal Unfair Competition)**

19 **Under 15 U.S.C. § 1125(a)**

20 28. NWC restates and reavers the allegations of Paragraphs 1 through 27, inclusive.

21 29. NWC's common law word and design marks, namely, PRO-BIOTICS PLUS and  
22 PROBIOTICS PLUS 12 word mark (the "Common Law Trademarks"), are inherently distinctive.  
23 Moreover, as described above, the Common Law Trademarks have been extensively used,  
24 advertised, and promoted through the United States, and the world for over 8 years in connection  
25 with NWC's products.

26 30. As a result of NWC's use, advertisement, and promotion, NWC's Common Law  
27 Trademarks have become well and favorably known throughout the United States and world as  
28 identifying NWC and its products. NWC has developed exceedingly valuable goodwill with

1 respect to its Common Law Trademarks.

2 31. Upon information and belief; Defendants have imported, advertised, promoted,  
3 displayed, offered for sale, and/or sold infringing products bearing identical, or nearly identical  
4 copies of NWC's Common Law Trademarks, as identified above and depicted in Exhibits 3 and  
5 4.

6 32. Defendants' use of the Common Law Trademarks is likely to cause members of  
7 the relevant public and trade to believe that the products sold bearing the Common Law  
8 Trademarks are provided by or in affiliation with or under the sponsorship or approval of NWC.

9 33. Upon information and belief, Defendants selected, adopted and use the Common  
10 Law Trademarks with knowledge of NWC's ownership thereof, and the valuable goodwill and  
11 business reputation associated therewith, and with intent to confuse, mislead, and deceive the  
12 public into believing Defendants' goods come from NWC or are in some manner associated with,  
13 approved or endorsed by NWC.

14 34. Upon information and belief, unless restrained by this Court, Defendants will  
15 continue to infringe NWC's genuine Common Law Trademarks by its use on similar products as  
16 sold by NWC.

17 35. By their wrongful acts, Defendants, unless restrained by this Court, will cause  
18 serious and irreparable harm to NWC.

19 36. NWC has no adequate remedy at law.

20 **THIRD CAUSE OF ACTION**

21 **(Unfair Competition under Cal.Prof.Code § 17200 *et seq.*)**

22 37. NWC restates and reavers the allegations of paragraphs 1 through 36, inclusive.

23 38. Defendants' above-averred actions constitute unlawful, unfair, and fraudulent  
24 business practices and unfair, deceptive, misleading, and false advertising in violation of Cal. 26  
25 Bus. & Prof. Code § 17200, *et seq.*

26 39. By their wrongful acts, Defendants, unless restrained by this Court, will cause  
27 serious and irreparable harm to NWC.

28 40. NWC has no adequate remedy at law.



1 **FOURTH CAUSE OF ACTION**

2 **(Dilution of Trademarks )**

3 41. NWC restates and reavers the allegations of paragraphs 1 through 40, inclusive.

4 42. Plaintiff's Registered Trademark PRO-BIOTICS PLUS has become a famous  
5 trademark and is therefore subject to protection as a famous trademark under Section 43(c) of the  
6 Trademark Act of 1946, as amended, 15 U.S.C. § 1125(c)(2).

7 43. The aforesaid acts of Defendants are likely to dilute Plaintiff's famous and well  
8 known PRO-BIOTICS PLUS mark insofar as Defendants' use the mark as their brand name,  
9 product names, website address and other usages in connection with their products sales is likely  
10 to lessen the capacity of the famous PRO-BIOTICS PLUS mark to uniquely identify and  
11 distinguish the goods and services of Plaintiff.

12 44. The aforesaid acts of Defendants constitute dilution of Plaintiff's famous PRO-  
13 BIOTICS PLUS mark in violation of Section 43(c) of the Trademark Act of 1946, as amended,  
14 15 U.S.C. § 1125(c).

15 45. As to all of the above Counts, Defendants' aforesaid acts greatly and irreparably  
16 damage Plaintiff and will continue to so damage Plaintiff unless restrained by this Court.

17 46. NWC has no adequate remedy at law.

18 47. Plaintiff reserves the right to amend the facts and allegations of these pleadings  
19 as necessary and as indicated by facts as revealed to Plaintiff through discovery and as permitted  
20 by FRCP, the laws of this State and the United States, and as allowed under the notions of fair  
21 play and substantial justice.

22 **PRAYER**

23 Wherefore Plaintiff demands judgment as follows:

24 1. Injunctive relief temporarily and permanently enjoining each of the Defendants  
25 collectively and individually, their agents, directors, officers, servants, owners, shareholders and  
26 employees, and all those in privity with the named Defendants from using  
27 PROBIOTICPLUS.NET, PROBIOTIC PLUS, PROBIOTICSPLUS, PROBIOTICS 12 PLUS or  
28

1 any variant thereof in any manner, directly or indirectly, and from marketing, advertising,  
2 labeling, promoting probiotics, enzymes, nutritional supplements, dietary supplements, or similar  
3 or related goods or services, and from engaging in unfair competition against Plaintiff and from  
4 defaming Plaintiff in connection with marketing, advertising, labeling, or promoting probiotics,  
5 enzymes, nutritional supplements, dietary supplements, or similar or related goods or services,  
6 during the pendency of this action and thereafter forever permanently in perpetuity.

7         2.         Injunctive relief temporarily and permanently enjoining each of the Defendants  
8 from otherwise infringing any of Plaintiff's trademarks.

9         3.         Injunctive relief temporarily and permanently enjoining each of the Defendants  
10 from otherwise competing unfairly with Plaintiff.

11         3.         Ordering an accounting of the gains and profits realized by all Defendants  
12 collectively and individually from all the aforementioned wrongful acts and/or any use of the  
13 marks PROBIOTICPLUS.NET, PROBIOTIC PLUS, PROBIOTICSPLUS, PROBIOTICS 12  
14 PLUS or any variant thereof in any manner, directly or indirectly;

15         4.         Requiring all Defendants collectively and individually to cause to be destroyed  
16 any material in their possession bearing a reproduction or colorable imitation of  
17 PROBIOTICPLUS.NET, PROBIOTIC PLUS, PROBIOTICSPLUS, PROBIOTICS 12 PLUS or  
18 any variant thereof in any manner, directly or indirectly, including without limitation: signs,  
19 brochures, packages, wrappers, advertisements, flyers, testimonials, labels, invoices, fax cover  
20 sheets, computer files, electronic data, computers and computer servers, digital storage media,  
21 floppy disks, CDs, DVDs, and any other printed material and internet websites.

22         5.         Awarding Plaintiff any and all profits made by Defendants as a result of the  
23 aforesaid infringement, together with interest thereupon in an amount presently unknown/

24         6.         Awarding Plaintiff punitive damages from the Defendants collectively and  
25 individually to punish Defendants for their willful and reckless indifference to the rights of other  
26 exemplified by their willful misappropriation of Plaintiff's Registered Trademark or any variant  
27 thereof and for the unfair competition practiced by Defendants against Plaintiff;

28         7.         Ordering Defendants, under 15 U.S.C. § 1116, to file with the Court and serve

1 on Plaintiff and its attorney(s) of record a report in writing under oath setting forth in detail the  
2 manner and form in which Defendants collectively and individually have complied with the  
3 terms of the judgment and injunction; and

4 8. For Plaintiff's damages in an amount presently unknown but believed to be at  
5 least \$1,000,000.00, together with interest, sufficient to compensate Plaintiff for trademark  
6 infringement, as the Court may deem just and proper.

7 9. For damages for lost business profits, if any, and other costs to rehabilitate and  
8 reinstate the reputation and fame of the PRO-BIOTICS PLUS Registered Trademark.

9 10. For treble damages and for an award of special damages pursuant to 15 USC  
10 Section 1117(b).

11 11. For costs of suit and reasonable attorney fees of the subject litigation and  
12 interest as allowable by law, including but not limited to pursuant to 15 USC Section 1117(a) and  
13 17 U.S.C. § 505.

14 12. For such other and further relief as the Court may deem just and proper.

15 Respectfully submitted,

16 RAY K. SHAHANI  
17 ATTORNEY AT LAW

18 Dated: February 21, 2011

By: \_\_\_\_\_

Ray K. Shahani, Esq.  
Attorney for Plaintiff

21 **DEMAND FOR JURY TRIAL**

22 Plaintiff hereby demands a jury trial of all issues in the above-captioned action which are  
23 triable to a jury.

25 RAY K. SHAHANI  
26 ATTORNEY AT LAW

27 Dated: February 21, 2011

By: \_\_\_\_\_

Ray K. Shahani, Esq.  
Attorney for Plaintiff

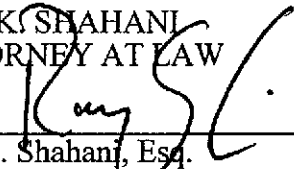
1                                    **CERTIFICATION RE INTERESTED PARTIES OR PERSONS**

2                    Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the  
3 named parties, there is no such interest to report.

4  
5  
6                    Dated: February 21, 2011

By:

RAY K. SHAHANI  
ATTORNEY AT LAW

  
Ray K. Shahani, Esq.  
**Attorney for Plaintiff**

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11                    ///